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IN THE

Supreme Court of the United States,

OCTOBER TERM—1925.

No. 94.

LITTLEJOHN & CO., INC., *et al.*,

Appellants,

—against—

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANTS.

JAMES W. RYAN,
JOHN M. WOOLSEY,
Counsel for Appellants.

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POINTS.

I.

A Resolution of Congress which does not expressly disaffirm recognized rules of international law designed to mitigate the horrors of war should be held not to authorize violations of those rules if any intent can be given consonant with the rules.

Counsel for the Government concede in their brief that the Government's claim or suggestion rests on the assumption that Congress by the Resolution of May 12, 1917, intended to authorize a violation of both international law and maritime law. They say (at p. 13):

> "Condemnation proceedings in a prize court are usual in maritime law and are useful in set-

> tling titles to vessels against all the world, but such a proceeding may be dispensed with by Congress."
>
> "Under the Resolution of May 12, 1917, the institution of proceedings in a prize court was not necessary to the acquisition of title or lawful possession. The resolution did not provide for any such judicial proceeding."

In support of these statements they cite a quotation from the majority opinion in *The Western Maid,* 257 U. S. 419, 432, that, "There is no mystic over-law to which even the United States must bow" and the statement of Judge Augustus Hand in his opinion in this case that "International law will be enforced in our courts but not in the face of a constitutional act of Congress" (R. 57).

They rest on the theory that Congress by the Resolution of May 12, 1917, intended to authorize a confiscation of the *Antigone*, and that under the decisions of this Court in *Brown* v. *United States,* 8 Cranch. 110, and *Miller* v. *United States,* 11 Wallace 268, this Court cannot curb an attempted confiscation which admittedly violates the recognized usages of nations constituting the law of war or prize. The point to which counsel for the Government have devoted their entire brief does not arise until it is determined that Congress by the Resolution of May 12, 1917, intended to do more than detain and operate the *Antigone* as seized enemy property in the same way that Great Britain and France detained and operated the vessels seized by them, and in the same way that the Alien Property Custodian detained and operated the enemy owned factories and "going concerns" on land. If the *Antigone* was merely detained and operated as property which had been seized but which still belonged to the enemy owner, the United States was acting merely as an Alien Property Custodian or Public

Trustee and was not bound at the end of the war to return her to her owner free from physical injuries and maritime collision liens incurred as a result of ordinary marine risks to which she was subjected during her war operation.

This is one of the facts which markedly distinguish this case from *The Western Maid,* 257 U. S. 419. In *The Western Maid* three vessels were involved. One was owned absolutely by the United States. The United States had promised by written charter party to return the other two vessels to their American owners at the end of the war free from physical injuries and maritime collision liens. The lien liability in *The Western Maid* therefore was that of the United States. The lien liability in the present case however is that of the German owned vessel and, looking at the case as of the time of the collision, would be enforced by a sale of the vessel at the end of her war service and thus be paid by the German owner, who would look for recoupment to his own Government.

However as counsel for the Government have briefed only the first point above mentioned, and as it is also one of the principal questions certified by the District Court we will discuss it first.

Judge Hand has certified "for the decision of the Supreme Court of the United States" (R., 60) "the questions of law" (R., 60) arising from his holding:

> "2. That Congress by the Joint Resolution of May 12, 1917, did not contemplate a deposit of the vessel's value, or proceedings in a prize court.
>
> 3. That, as so interpreted, the resolution, although in violation of International Law, should be regarded by this Court as a valid exercise by Congress of its war power" (R., 60).

Both international law and maritime law consist of the usages of nations. Counsel for the Government do not contend that the fact that one nation, the United States, determined arbitrarily to violate such usages indicates that the usages did not exist or were inapplicable. They merely wish to extend to international law the decision of this Court in the *Western Maid* with reference to the maritime law.

It is significant that counsel for the Government on page 13 of their brief slur over any difference between international law and maritime law by saying that "condemnation proceedings in a prize court are usual in maritime law". The law of prize or seizure of enemy vessels in time of war is part of international law, not maritime law. The law of collision which alone was involved in the *Western Maid,* is part of maritime law.

The attitude of counsel for the Government toward international law shown in their brief does not, we respectfully submit, accord with the decisions of this Court or with the attitude of the United States as represented by its statesmen and official spokesmen such as former Secretaries of State Hughes, Root and Hay and Ambassador Choate.

The pernicious and far-reaching results of the short-sighted national policy suggested by counsel for the Government are best illustrated by a news item in the New York Times on December 25, 1925, which is applicable to this very case. The item reads as follows:

"BRITAIN DENOUNCES ENEMY SHIP CLAUSE

Chamberlain Explains Why Powers Failed to Ratify Hague Convention.

London, Dec. 24, 1925. Britain's denunciation of The Hague Convention regarding enemy mer-

chant ships was made known today, when the Foreign Office sent to representatives abroad announcements to that effect signed by Sir Austen Chamberlain, Foreign Secretary.

'The aspiration of the framers', wrote Sir Austen, 'was not only to introduce uniformity of practice into treatment by belligerent States of enemy ships found in their ports at the outbreak of hostilities but to insure amelioration of their lot in such circumstances.'

According to Sir Austen, this purpose has wholly failed of achievement. While some countries signing the convention, he states, allowed enemy vessels to leave their ports during the World War, most of the countries confiscated them at the beginning of hostilities. But under the convention, he says, the British Privy Council held that such ships, if not allowed to depart freely, could only be detained and not confiscated. This ruling in future might place England at a disadvantage, he says, and hence the decision to denounce the convention.

Of the powers signing the convention, seventeen failed to ratify; two, Germany and Russia, ratified with important reservations, while the United States did not sign at all, he declares."

The section of the Hague Convention of 1907 referred to in the above quoted dispatch is quoted in full at page 65 of our main brief. The American delegation refused to sign the Convention on the ground that it did not go far enough to express what had already become an absolute binding obligation so far as the United States was concerned. See the American Delegation's Report in Foreign Relations of the United States, 1907, at page 1158.

Joseph H. Choate, who represented the United States as First Delegate at the Hague Peace Conference in 1907, at pages 74 to 77 of "The Two Hague Conferences"

(being the lectures delivered in 1912 by Mr. Choate at Princeton University), said:

> "We went instructed by our Government [through Secretary of State Root] to maintain, to the best of our ability, our old claim for the immunity of private property at sea, that is, of private and unoffending property, not contraband, even in enemies' ships at sea in time of war. Franklin had endeavored to have this inserted as a substantial clause in the treaty of peace between us and Great Britain in 1783, placing private property at sea in the same position of immunity as private property on the land; that except in cases of contraband, it should not be liable to capture, which was a very important move in the direction of saving inoffensive and unoffending commerce from spoliation and destruction in case of war, and very much for the benefit of the world at large, to make commerce free always from interruption by war any further than was absolutely necessary.
>
> Time and again our government had pressed it during the intervening hundred years between Franklin's death and the meeting of the Conference. They had proposed it at the First Conference, from which it was absolutely excluded, although Dr. White succeeded in putting on file a very powerful memorial in support of it, and made a most effective address in its behalf.[1] The First Conference would not listen to it; they said it was not within the programme, but recommended the careful study of it for consideration of the next Conference, where it properly came up. We had it inserted, by Franklin himself, in the treaty of 1785 with Prussia, and once we had it in a treaty with Italy, and several times other nations, imitating that example, when war broke out between them, agreed, at the outbreak, that there

[1] For the proceedings of the First Hague Conference concerning the immunity of private property on the high seas and for Dr. White's address, see Holls' 'The Peace Conference at The Hague', pages 306-321.

should be such immunity, but no substantial progress had been made in the way of its recognition as an international doctrine when our Conference met.

Of course, most of the great nations opposed it. Germany was the only one of the great fighting nations that voted affirmatively with us, but it was very respectfully considered and fully discussed, and after several weeks, in which it came up from time to time, almost two-thirds of the nations voting, that is, by a vote of twenty-one to eleven, recorded their votes in favor of the establishment of such immunity. See 'Deuxiéme Conférence Internationale de la Paix', Vol. III, pages 834-835. It was not found possible, however, in the face of great commercial nations that opposed it, and which were likely at any time to be engaged in war, to press it further. Our orders were not to press anything to the point of irritation, but if we found it impossible to carry a matter through at this Conference, to carry it as far as we could and then drop it leaving it for further consideration, in the hope that by and by, with the growing sense of international justice, it would be accepted by the nations.[2]

So there it stand for these twenty-one nations who supported us to enter into such an agreement among themselves, or in case of war breaking out between any of them, to make a special agreement for the immunity, or for action by the next Conference to be held in 1915.

So there again, very positive progress was made. We stand no longer where we did at the beginning of the Conference, nobody assenting to it but ourselves, but twenty other nations of greater or less importance pledged to the proposi-

2 For the action of the American Delegation of the Second Hague Conference in the matter of the immunity of private property on the high seas, see Mr. Choate's address of June 28, 1907, in 'Deuxieme Conference Internationale de la Paix', Vol. III, pages 750-764. For an English version of the address, see pages 766, 779; also Scott's 'American Addresses at the Second Hague Peace Conference', pages 1-24.

tion which would make so strongly for peace and for the limitation of armaments."

Great Britain, France and all the other nations involved in the War, recognizing the applicability of this Hague convention merely violated it to the extent of detaining or sequestering and operating the seized ships during the war as detained enemy vessels. At the end of the war they all claimed that by the Treaty of Versailles the Germans voluntarily granted permanent possession and title to these detained ships to the Reparations Commission or to the nation which detained or seized them.

Our contention is that the United States operated these ships on the same basis as all other nations and that notwithstanding the somewhat confusing literal language used in the first paragraph of the Resolution of May 12, 1917, Congress did not intend that the President should do more than operate as seized enemy property the ships which in April, 1917, had been detained or sequestered.

Such course would not require any proceeding in a prize court, and explains the rejection by Congress of the proposed prize court amendment to the Resolution.

This was the policy that Congress later adopted in the Trading with the Enemy Act of October 6, 1917, with reference to privately owned enemy property seized on land. Congress did not intend to condemn permanent possession or title or any property right of the German owners. Such course would have required a prize court proceeding.

Construed as we suggest, the Resolution was both constitutional and in accordance with international and maritime law.

The history of the Resolution, the actual sequestration of the ships long before the Resolution was introduced, the traditional policy of the United States and par-

ticularly its treaties with Prussia and its official attitude at the Hague Conventions, all show that this is the only reasonable interpretation of the Resolution.

The Resolution is capable of the construction suggested by counsel for the Government only by divorcing it absolutely from the circumstances attending its passage and from the officially declared policy of the United States.

In *The Buena Ventura,* 175 U. S. 384, this Court held that inasmuch as enemy merchant vessels innocently in United States ports just before the outbreak of hostilities in the war with Spain "would, in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive" it became necessary, upon the issuance of an Executive Proclamation respecting the treatment of merchant vessels, "to put upon the words used therein the most liberal and extensive interpretation of which they are capable", and that where there were two or more interpretations which possibly might be put upon the language, the one which would be most favorable to the enemy nationals ought to be adopted. This Court based its interpretation of the exemption claimed partly upon the historic attitude of the United States in favor of the mitigating, as to all noncombatants, of the hardships and horrors of war, and partly also upon the later practice of civilized nations.

John Bassett Moore in his Digest of International Law, vol. VII, at page 453 says:

> "It was formerly the practice not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war, so that, if war should come, they might be confiscated. A rule of precisely the opposite effect has been enforced in recent wars."

See also our main brief, pages 26, 63 and 70.

Miller v. *United States*, 11 Wallace 268, is not a precedent in conflict with the others we have cited. Its justification is that a sovereign seeking to subjugate rebellious subjects is not in the position nor bound by the rules that govern the conduct of one state making war against another. The question of confiscation under the Captured and Abandoned Property Acts did not come before this Court in its international aspect. The decision reached by the majority of the court, stated by Mr. Justice Strong, is undoubtedly correct, but the dissenting opinion of Mr. Justice Field enunciates more correctly the principles upon which the decision should have been reached.

The inapplicability to this case of the decisions in *Miller* v. *United States*, 11 Wallace 268, and in *Brown* v. *United States*, 8 Cranch 110, has been so conclusively shown by John Bassett Moore, the leading American authority on international law, and by Edwin M. Borchard that we quote at length from the article by Professor Borchard incorporating their views regarding those two decisions.

In 23 Columbia Law Review 383, "Are We Entitled to Confiscate Enemy Private Property", by Professor Edwin M. Borchard of Yale Law School, it is said:

> "The provision of article 297 of the Treaty of Versailles, by which private property of ex-enemy nationals has been take over by several of the Allied governments, sanctioned a policy of confiscation, a practice which, for the most practical of reasons—its short-sightedness—had been abandoned since 1793, and which few students of international law believed would ever be revived. * * * Attention has previously been called to the law and policy of confiscation in its general development; the present comment, confined more

particularly to American law and practice, is induced by a *dictum* of Judge Rogers of the Circuit Court of Appeals in *Miller* v. *Kaliwerke Aschersleben Aktiengesellschaft* (C. C. A. 2nd Cir. 1922) 283 Fed. 746, 757, to the effect that 'as respects the enemy bona fide holder * * * the government is plainly entitled to confiscate his interest in an American corporation'.

Whether the court intended to convey by the word 'entitled' the idea that the United States was legally privileged to confiscate the private property, on general principles or under existing law, is not clear. The court does not appear to have studied the question very closely, but relied for its authority on the Civil War case of *Miller* v. *United States,* 11 Wallace 268. It becomes, therefore, of some interest to examine the *Miller* case. Judge Rodgers is not the first person who has used it as the American judicial authority for confiscation of enemy private property—mistakenly and unjustifiably, it is believed.

On August 6, 1861, Congress passed an Act to confiscate property which was used or intended to be used in aid of the rebellion; on July 17, 1862, a further Act was passed 'to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes'. Contrary to the Act of 1861, the Act of 1862 was designed not to forfeit property unlawfully employed, but to punish individuals who had aided the rebellion by confiscating all their property. The offense was personal. The sixth clause of the fifth section of the Act of 1862 provided that 'the property of any person who, owning property in any loyal State * * * shall hereafter assist and give aid and comfort to such rebellion' was to be forfeited. The information against Miller alleged not only that he was a 'public enemy' but also that he was a 'rebel citizen', and that as owner of certain railroad stock, he had employed it 'in aid of the enemy' and had

'assisted and given aid to the rebellion against the Government'.

Such being the purpose of the statute and the facts under which Miller's property was forfeited, Miller's executor in a subsequent proceeding challenged the validity of the forfeiture on the ground that due process had been lacking in that Miller had been denied a jury trial, according to the fifth and sixth amendments. To escape this contention, Justice Strong, for the majority of the Supreme Court, found that the plaintiff's default had made a jury unnecessary, and further held that the Acts were passed under the war powers of Congress, which, he said, relieved Congress from the restrictions of the fifth and sixth amendments. He then undertook to assume what he should have sought to prove; namely, that war authorizes the confiscation of enemy private property found in one's own territory. Justice Strong says:

> 'Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be *legitimately* prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right'.

He added

> 'that the right to confiscate the property of all public enemies is a conceded right'. (Italics are the author's.)

Had Justice Strong consulted the decision of Chief Justice Marshall and the political history of the United States he would probably not have come to this conclusion. He reached it apparently without the citation of any authority and seemingly without knowledge that there was any law on the subject in the United States. Justice Field, speaking for the minority, seems to have been far

sounder in his judgment, for he said that even the Congressional power 'to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe, *subject to the condition that they are within the law of nations.*' (Italics are the author's.) He concluded that confiscation was contrary to international law and to the decisions of the Supreme Court.

The law of nations on this subject is believed not to be in doubt. Not only our courts, but American political traditions and the authorities on international law unite to condemn the ancient practice of confiscation as contrary to the modern law of nations. To take the writers first, the whole law is summarized in a few paragraphs by John Bassett Moore. He says:

> 'It is true that in certain early writers who reiterated the stern rules of the law of Rome, sweeping generalizations may be found in which the right is asserted on the part of enemies to seize all property and confiscate all debts. The same writers, upon the same authority, assert the lawfulness of treating all subjects of the belligerent as enemies, and as such of killing them, including women and children. These generalizations, even at the time when they were written, neither expressed nor purported to express the actual practice of nations, and it is superfluous to declare that the law of the present day is not to be found in them; for, with the change in the practice of nations, growing out of the advance in human thought, the law also has changed.'

Mr. Moore adds, after reviewing the authorities:

> 'Finally, without unnecessarily multiplying authorities on a point which is undisputed, we may quote from Hall the following passage:
>
> '"Property belonging to an enemy which is found by a belligerent within his own juris-

diction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation".'

The American tradition in this matter was laid in the treaties of 1783 and 1794 with Great Britain. Under the former we undertook that the states, some of whom had during the Revolution confiscated British property and credits, would restore the owners in their rights; and under the treaty of 1794 we paid Great Britain some six hundred thousand pounds sterling because of our inability to enforce upon the states the treaty promise of 1783. It was in support of this provision of the Jay Treaty of 1794 that Hamilton wrote some of his famous Camillus Letters, which have been regarded as the classic American expression of policy.

The courts of the United States, while not always so clear, have, nevertheless, with the possible exception of the *Miller* case, added their authority to sustain the American tradition. As early as 1796 in *Ware* v. *Hylton*, where a confiscatory act of Virginia was denied validity by the Supreme Court, Justice Paterson remarked that even at that date the confiscation of private property was considered 'as a relic of barbarism * * * it ought not to have existed among any nations and perhaps is generally exploded at the present day in Europe.' He added, speaking of confiscation, 'the gain is at most temporary and inconsiderable; whereas the injury is certain and incalculable and the ignominy great and lasting'. Justice Wilson added: 'By every nation, whatever its form of government, the confiscation of debts has long been considered disreputable'. Debts, of course, are merely one form of property.

Chief Justice Marshall in the famous case of *Brown* v. *United States*, 8 Cranch 110, not altogether removed from the influences of the eigh-

teenth century and of the fact that he had been counsel for Hylton in *Ware* v. *Hylton*, 3 Dallas 199, and therefore had sought to defend the validity of a title derived through confiscation, made a somewhat equivocal statement as to the law, which has required some explanation. He said: 'Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself * * * although, in practice, vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war'.

He added therefore that 'according to modern usage', private property 'ought not' to be confiscated. He said 'this usage * * * cannot be disregarded by (the sovereign) without obloquy.'

Some doubt has been created by this passage because it apparently sanctioned the 'right' of confiscation, but condemned its exercise as 'affected' by modern usage. In fact, Marshall acted in the case upon the rule that it was contrary to international law to regard private property on land as subject to confiscation. If, however, the 'exercise' of a right has become unlawful by usage, it is not easy to see how the right itself could help being impaired. No one has pointed this out more clearly than John Bassett Moore. Speaking of Marshall's professed distinction between a right and the exercise of a right, he has said:

> 'Referring to the practice of nations and the writings of publicists (Marshall), declared

that according to "the modern rule, tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated"; that "this rule" seemed to be "totally incompatible with the idea that war does of itself vest the property in the belligerent government;" and consequently, that the declaration of war did not authorize the confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that "war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found", and that the "mitigation of this rigid rule which the humane and wise policy of modern times has introduced into practice" though they "will more or less affect the exercise of this right", "cannot impair the right itself". Nor were the two declarations quite consistent. The supposition that usage may render unlawful the exercise of a right, but cannot impair the right itself, is at variance with sound theory. Between the effect of usage on rights, and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immutability or immunity from the fact that the practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the dictum in question to the influence of preconceptions, and turn for the true theory of the law to an opinion (*United States* v. *Percheman*, 7 Peters 51), of the same great judge, delivered twenty years later, in which he denied the right of the conqueror to confiscate private property, on the ground that it would violate "the modern usage of nations which has become law".'

Since Marshall's decision in the *Percheman* case, the judicial view as to the illegality of confiscation, confirming as it did the political view

> of national policy, was regarded as settling the question for the United States. The unsoundness of using the Confiscation Acts of 1861 and 1862 as precedents or authority for the confiscatory treatment of the private property of foreign enemies in a foreign war is pointed out by Mr. Hyde in his recent work. Justice Strong, therefore, in assuming the Acts to have been passed under the alleged 'conceded right' of belligerent confiscation fell into error, it is believed, and Judge Rogers, in following that *dictum* without question, would appear to have been misled."

In *United States* v. *Klein* (1871) 13 Wallace 128, speaking of the Act of March 12, 1863, Chief Justice Chase said:

> "There is, so far as we are aware, no similar legislation mentioned in history."

Notwithstanding the obviously confiscatory nature of that Act, this Court held, basing its decision upon the law of nations, that

> "'the Government constituted itself the trustee for those who were * * * entitled' or 'whom it should thereafter recognize as entitled' to the captured property and that 'the Government recognized to the fullest extent *the humane maxims of the modern law of nations, which exempts private property of non-combatant enemies from capture as booty of war.*' Accordingly, 'the title to the proceeds of the property which came to the possession of the Government by capture or abandonment, with the exceptions already noticed, was in no case divested out of the original owner'."

In *The Paquete Habana*, 175 U. S. 677, a case arising out of the seizure of a fishing vessel during the Spanish War, this Court, after reviewing at length the origin of

and reasons for the rule, followed the rule of international law against confiscation of enemy private property.

In England the rule has been settled for more than a century that acts of confiscation by a belligerent of unoffending, privately owned enemy property, are in violation of the usages of nations and are void.

In *Wolff* v. *Oxholm* (1817) 6 M. & S. 92, an action on a pre-war debt, the defense was that the Danish government during the war had confiscated such debts. Lord Ellenborough expressly held that the confiscation act of the Danish government was "not conformable to the usage of nations" and therefore was not binding on an English court.

In *2 Oppenheim on International Law* (2d ed.) 139 it is said that:

> "'Through the influence of such treaties as well as of Municipal Laws and Decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate enemy property nor annul enemy debts on their territory'. He then says that the last case of confiscation occurred in 1793 and continues: 'there is now a customary rule of international law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent'."

In *Hall on International Law* (6th ed.) 435 it is said:

> "The common interests of all nations and present feeling, warrant a confident hope that the dying right will never again be put in force, and that it will soon be wholly extinguished by disuse."

In *Fiore on International Law* (5th ed. 1918, E. M. Borchard's translation) it is said:

> "The private property of enemy citizens should be regarded as inviolate in war on land as well as in maritime war, subject, however, to the limitations which may be regarded as based upon the necessities of war, the damages and destruction justified as incidental to attack or defense, and in certain well-established cases, the liability to confiscation, when the belligerent may be regarded as authorized to exercise the right of prize capture."

See to the same effect:

2 Westlake on International Law (1902 ed.) 42;
Wheaton on International Law (8th ed.) Sec. 298, page 378;
Bentwick, Law of Private Property in War, page 26;
Lawrence on International Law (3rd ed.) Sec. 196, pages 350, 352;
Alexander Hamilton, Camillus Letters (1795) XIX;
7 Moore, International Law Digest 462.

The United States has from the beginning recognized international law as part of the law of the United States.

As early as 1796 Mr. Justice Wilson said that "when the United States declared their independence they were bound to receive the law of nations in its modern state of purity and refinement". *Ware* v. *Hylton,* 3 Dallas 199, 281.

In *The Paquete Habana,* 175 U. S. 677, Mr. Justice Gray, delivering the opinion of this Court said:

> "International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."

The statesmen and jurists of the United States have regarded the acceptance of the rules of international law as a part of the condition on which a state is originally received into and entitled to remain in the family of nations.

Lord Russell of Killowen, in his speech to the American Bar Association in 1896 (30 American Law Review 643; quoted in 16 Am. & Eng. Ency. of Law 1125) said that the definition of international law in *Regina* v. *Keyn,* 2 Exchequer, Div. 153, was too narrow because it "relies too much on force as the governing idea". He said further:

> "If the development of law is historically considered, it will be found to exclude that body of customary law which in early stages of society precedes law, which assumes definitely the character of positive command coupled with primitive sanctions * * *. As government becomes more frankly democratic * * * laws bear less and less the character of commands imposed by a coercive authority, and acquire more and more the character of customary law founded on con-

> sent * * *. I claim then that the aggregate of the rules to which nations have agreed to conform in their conduct toward one another are properly to be designated 'international law' ".

In *Regina* v. *Keyn,* 2 Exch. Div. 153, Lord Coleridge said:

> "The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and acts of state are but evidence of the agreement of nations, and do not in this country (Great Britain) at least, *per se* bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English courts give effect, as part of English law, to such agreement."

In Kent's Commentaries, vol. I, page 19, it is said:

> "In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law."

Professor John Dewey of Columbia University in 23 Columbia Law Review 316, 317, reviewing Sir Frederick Pollock's Essays in the Law, said:

> "We select the essays on 'The History of the Law of Nature' as typical of the merits of the book. The first traces the fortunes of the doctrine from Aristotle, through the Stoics and Roman lawyers, the medieval and renaissance doctrines, down to Protestant and Reformation influences, and then shows how *under the name of 'reason' the same ideas became incorporated in*

> *English common law*—the 'law of nature' having too much flavor of Roman law and of ecclesiastic courts to recommend itself to English lawyers. It is shown that amid all these historic vicissitudes, natural law has had a single common function: that of supplying an ethical standard for legal ideas and practices, and that the application of the ethical criterion has been saved from becoming private and arbitrary by identifying natural law or the law of reason with custom in the degree of its generality or area of acceptance. The second essay on this subject traces *the beneficial influence of the idea in English law, pointing out the indebtedness to it of national acknowledgment of international practices so that they become true law*; of the incorporation of the Law Merchant into common law; of the development of the doctrine of quasi-contracts; of that of negligence; *of the development of legal jurisdiction in cases where at first there seems to be no legal remedy available*; of court review of the quasi-judicial decisions of administrative bodies; of private international law." (Italics ours.)

The statement of Judge Hand in his opinion below that the Treaty with Germany nullified any property right or maritime lien the appellants theretofore had in the *Antigone* is not supported by counsel for the Government in their brief in this Court. The statement is of course unsound because Judge Hand apparently overlooked the fact that the appellants are American citizens and British neutrals. The nullifying by Act of Congress or Treaty of their vested rights would be unconstitutional. It would deprive them of their property without due process of law. As said by Arthur T. Hadley in The Constitutional Position of Property in America, in *The Independent*, April 16, 1908:

> "The general status of the property owner under the law cannot be changed by the action

of the legislature or the executive or the people of the state voting at the polls, or all three put together * * * The fundamental division of powers in the Constitution of the United States is between the voters on the one hand and property owners on the other. Forces of democracy on one side, divided between the executive and the legislative, are set over against the forces of property on the other side, with the judiciary between them."

II.

Congress by the Resolution of May 12, 1917, did not intend to do more than detain and operate the *Antigone* as seized enemy property in the same way that Great Britain and France detained and operated similar vessels seized in their ports, and in the same way that the Alien Property Custodian detained and operated factories and "going concerns" on land. Such detained property is not property of the United States and it would be unfair to give such enemy owned property greater immunity from the jurisdiction of the courts than is accorded to property owned by American citizens who are helping to defend the United States from the enemy. THE BLONDE L.R. (1922) 1 A.C. 313, at IMPORT

The question regarding the nature of the Government's relations to the seized ships is exceedingly important from a practical point of view. If our contention is adopted that the United States merely operated them as detained enemy owned vessels, as Great Britain did, without assuming the marine operating risks, and did

not assert to itself any property right of possession or ownership until that right was granted by the Peace Treaty with Germany, the United States, if it ever grants compensation to the German private owners either freely or by compulsion of an international tribunal, will have to pay them only about $70,000,000, being the market value of those vessels at the time our treaty with Germany was entered into, which was after the slump in vessel values due to the then excess of tonnage for peace needs.

If the contention of counsel for the Government is adopted that the United States did not merely detain and operate the vessels but asserted a property right of possession or ownership in them at the time of the seizure in April, 1917, the United States in order to compensate the German owners would have to pay a sum conservatively estimated at in excess of $300,000,000, being the charter value of the vessels for the period of the War, or their market value in April, 1917 (such charter value and market value being substantially equivalent).

The issues have been narrowed by the Government's brief. Counsel for the Government abandon reliance upon the Treaties of Versailles or Berlin. They also rest squarely on the theory that the Government confiscated the *Antigone* under the authority of the War of 1812 case of *Brown* v. *United States* and the Civil War Confiscation and "Rebel Citizen" Case of *Miller* v. *United States.*

Restatement of the Facts.

A summary restatement of the facts in the light of these changes in the issues will, we believe, tend still further to simplify the case.

This is a libel in admiralty to enforce a maritime lien on the Steamship *Antigone* for collision damages. The libel alleges that after the collision the United States by the Treaty of Versailles (which became effective by the ratification of France on October 13, 1919), supplemented by the Treaty of Berlin, acquired the *Antigone* subject to the collision lien.

The *Antigone* at the time the libel was filed was admittedly subject to the ordinary *in rem* process of the admiralty court. The *in personam* form of the remedy sought under the Suits in Admiralty Act is without significance because that remedy, so far as this case is concerned, is a mere substitute for an *in rem* proceeding against the vessel.

The United States Attorney at New York, through two of his assistants, signed and filed a claim (so described by Judge Hough—R. 23) or "suggestion" to the *Antigone* which is unsupported by any of the usual documents showing right of possession of a vessel, but which alleges that she had been seized in war time and at the time of the collision was an Army transport and was therefore a public vessel owned by the United States and immune from liability or lien.

The issue therefore is whether the relation of the United States to the *Antigone* on October 9, 1919, when the collision occurred, was such as to entitle the vessel to immunity from the ordinary jurisdiction of the admiralty courts for a violation of the maritime rules designed to prevent collisions and loss of life and property at sea. Whether this relationship was such as to entitle

the vessel to immunity can best be determined by considering the problems relating to these ships which Congress and the President were trying to solve, and not merely by reading the Resolution of May 12, 1917, as a written instrument entirely divorced from the situation which resulted in its adoption.

At the outbreak of the war in 1917 many unarmed German private merchant vessels were in United States ports. The same situation existed in England in 1914 when it declared war against Germany. Under the sixth section of the Second Hague Convention in 1907 these vessels could not be detained, confiscated, or requisitioned on payment of compensation, but must be given three days of grace within which to return to Germany. Instead of allowing the days of grace, England seized these vessels in its ports. Later, apparently in response to a protest by the United States that the seizure was a violation of international law, Sir Edward Grey, the British Foreign Secretary, explained that although Germany had formally signed and ratified the Hague Convention, England, not being satisfied that Germany would observe the convention, wanted a further promise covering this particular war that Germany would observe the convention as to English vessels in German ports. American White Book, European War, vol. I., pp. 44, 46, Letter Sir Edward Grey to Mr. W. H. Page, American Ambassador at London, February 19, 1915. No answer containing such further promise having been received within the time limit of an alleged ultimatum, the Crown brought suits against the vessels in the prize courts and they were "sentenced to detention in lieu of condemnation". American White Book, European War, I., 44, 46.

The detained vessels were operated by the English Government as detained, enemy-owned vessels. England regarded the detained vessels while being operated by it as in the same class as the other enemy private prop-

erty, such as factories, munition, aeroplane-parts, and chemical plants, etc., which its Public Trustee (corresponding to our Alien Property Custodian) had seized and was operating. England declared that it was merely detaining the vessels for the war period and that the operation was merely incidental to their detention. She disclaimed any obligation, on the vessels being returned to their enemy owners at the end of the war, to pay compensation to the enemy owners for physical injuries or maritime collision liens incurred during the war operation of the detained vessels. The enforcement of such a maritime lien against any of the detained vessels therefore would merely result in a sale of the detained vessel by an admiralty court at the end of the war and would thus not interfere with the operation of the vessel by the British Government and would be a loss falling on the German owners, who in turn had a right to look to the German government for recoupment of the loss on the ground that it was a cost of the war or loss of the German government.

The detention of the vessels was effected by a so-called "order of detention" entered by the prize courts. This order was first entered in the case of *The Chile,* 1. Br. & Col. Prize Cases (1914-1915), page 1; 1914 P. 212; 84 L. J. P. 1. Such orders were thereafter known as "Chile orders". No appeal was taken from the decision in *The Chile.* The right of the British government to "detain" these vessels on these conditions was, however, contested before the Judicial Committee of the Privy Council in *The Gutenfels* (decided April 7, 1916), 2 Br. & Col. Prize Cases 36, and in *The Prinz Adalbert* (decided February 4, 1918), 3 British & Col. Prize Cases 70, 72. In *The Prinz Adalbert* it was held, speaking through Lord Parker, that the government should be entitled to "detain" the ships, but that "The proper order should, in

their opinion, be what is known as the Chile Order, 1914 P. 212, at p. 217. The effect of making this order will be to reserve all rights intact for decision when the war is over, and the views of the German government as to the true construction of the Convention can be ascertained. As the order their Lordships propose to make is that which the appellants ask for in these appeals, and as they have had to come here to get it, the Crown should in their Lordships' opinion, pay the costs".

At the end of the war, Germany having lost, England neither returned any of the detained vessels nor awarded compensation to the German owners for the violation of international law in "detaining" the vessels without allowing them days of grace to return to Germany. The German nationals who owned the vessels are apparently precluded by the sweeping grant made by their government in the Treaty of Versailles from enforcing the return of the detained ships or obtaining compensation from England for the violation of international law in detaining them.

Before the United States entered the war our citizens were unable to use the interned German ships because a transfer of flag to a neutral in time of war would have been a violation of international law. A plan was proposed to create a United States Shipping Board to charter or purchase the interned ships and operate them as owned, absolutely or *pro hac vice,* by the United States Government, thus preventing any other nation from condemning the ships as prize. This was opposed and defeated by Senator Henry Cabot Lodge and others on the ground that it would be a violation of international law and would almost certainly bring us into the war. Henry Cabot Lodge's Autobiography, published 1925, pages 26, *et seq.*

The Shipping Board however was created. Shortly afterwards, on other grounds, we entered the war.

Our status having been changed from a neutral to a belligerent, there was no longer any reason for making the ships vessels of the United States Government in order to avoid their condemnation by other nations because of being transferred to neutral nationals in violation of international law.

All the German merchant vessels in United States ports, including the *Antigone*, were detained or sequestered in April, 1917 (R. 55) shortly before or at the time we declared war.

After we declared war the question arose whether the United States would observe the rule of international law which was incorporated in the sixth section of the Second Hague Convention of 1907 prohibiting the detention, confiscation or requisition on payment of compensation of these ships and requiring that they be given days of grace within which to return to Germany.

Upon the outbreak of the war with Spain President McKinley in a proclamation of April 26, 1898, had declared that "Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places". Foreign Relations, U. S., 1898, p. 772; Moore, Digest International Law, vol. VII., p. 454.

President Wilson, however, did not make a similar proclamation. Counsel for the Government have not disclosed what the Government's records show was the reason given by President Wilson for not making such a proclamation. Although we had not signed the Hague Convention of 1907, the only reason we had not done so was because we believed that it did not go as far in exempting enemy private vessels and property from seizure as the settled rules of international law, which we regarded as binding, already required. John Bassett Moore, Digest, International Law, Vol. VII., p.

About a month after we declared war a proposed Joint Resolution, apparently inspired by the Shipping Board, was introduced in Congress. The proposed resolution authorized the President to requisition the German merchant vessels in United States ports, and provided that "The property rights and claims to compensation, if any, of such subject or citizen (owner of a seized vessel) shall be determined at the end of the war" (S. J. R. 42, introduced April 23, 1917, Government's Brief, p. 17).

Upon being referred to committee, the Resolution was redrafted authorizing a requisition on payment of just compensation to be determined by the Court of Claims in suits by the owners of the requisitioned vessels. The resolution as so reported by the Committee was amended by merely striking out sections 3, 4 and 5 which provided for just compensation to be recovered in the Court of Claims, and by inserting before the words "possession and title" in the first section the word "immediate".

The resolution was actually adopted in this roughly emasculated form. As adopted the resolution would appear at first blush to be an absolute confiscation of "the immediate possession and title" of the vessels. But an amendment was rejected which provided for the forfeiture or absolute condemnation of the vessels in the prize courts, and for their temporary use under immediate requisition pending such final condemnation. It is therefore clear that Congress, although not providing for just compensation, did not intend to confiscate the vessels. The fact that the words "possession and title" in the first section of the resolution are vestigial remnants of language used by draftors intending solely a requisition on payment of compensation, deprives those words of any meaning of confiscation.

It is clear from the resolution as finally adopted, read

in the light of the defeat of the various amendments and of the British experience with the interned ships which was fresh in the minds of Congress at the time, and of our own subsequent Trading with the Enemy Act relating to all the remaining enemy private property, that Congress did not intend either a confiscation or a requisition on payment of compensation, but that what Congress intended by the resolution was merely to authorize the detention and operation of the ships on the same basis as England detained and operated the vessels seized in English ports, and on the same basis that the British Public Trustee and our Alien Property Custodian detained or sequestered and operated as "going concerns" the various enemy owned factories and systems of transportation on land.

This would be treating alike enemy private property on land and sea and would put our Government during the war on the same basis as the British and other Allied governments with reference to the seized ships (our information being that the other Allied governments followed the British practice of detention by an analogous Chile Order), and at the end of the war would leave our Congress free to return the detained vessels without any obligation to compensate for physical injuries or collision liens incurred during war operation as a result of normal marine operating risks. Congress could in addition, if it so desired, make a gift or grant some measure of compensation to the German owners in order to make amends for our violations of international law in not giving the vessels days of grace within which to return to Germany after we declared war, and in not even having orders of detention, requisition or condemnation entered by prize courts, which alone are entitled to "detain" or "take over" to a belligerent enemy vessels which are seized in war time.

The war having ended in the defeat of Germany, the

United States, like England and the other Allies, has been saved the embarrassment of atoning for the violations of international law in not allowing the detained German merchant vessels an opportunity to return to Germany, and in not submitting to a prize court (in which the enemy owner and other claimants against the *res* could be represented by counsel) in the case of each vessel the question as to what the rights of the United States under international law were with reference to such vessel.

At the conferences at Versailles of President Wilson, Lloyd George, Clemenceau and Orlando, the question arose regarding the disposition of the German private merchant vessels which had been seized in Allied and United States ports at the outbreak of war. Lloyd George and the other Allied representatives and their expert assistants fought bitterly any claim of the United States to the ships seized in United States port on the ground that under international law the United States had not acquired any property right in them, that they had always been entitled to fly the German flag, and that they were voluntarily granted by Germany by the Treaty of Versailles not to the United States but to the Reparations Commission. The Allied representatives contended that the ships seized in all the countries should be pooled and distributed by the commission among the Allies and the United States proportionately to the number of merchant vessels lost by each nation as a result of the submarine warfare.

President Wilson agreed, subject to ratification by the Senate, to pay $100,000,000 to the Reparations Commission in consideration of the grant or recognition by the Allies of the property right of the United States in the seized German ships. This agreement was not submitted to the Senate and has not been ratified by it.

Unfortunately the United States committed one more violation of international law than any of the Allied governments. The United States Shipping Board in exercising the authority conferred by the Resolution of May 12, 1917, simply ignored the prize court jurisdiction of the district courts and of this Court. The definition and development of the law of prize was one of the greatest achievements of this Court during the time of Marshall, Story, Pinkney, and Webster. See *Charles Warren, Supreme Court in U. S. History,* vol. 2, page 27. Questions in that part of international law included in the law of prize or war can only be decided by a prize court. The exercise of prize court jurisdiction in war times has always been regarded by this Court as an important function of the judicial power. It is the "war power" of the judiciary analogous to the war powers of Congress and the Executive.

An alleged claim of the United States, based solely on the law of prize or war, which is informally presented after a long delay, like the present one, not in a court of prize but in a court of admiralty, should be scrutinized carefully.

The Court should at least hold that such a claim can be heard only on the prize side. Until a decree or order of detention or other document showing right of possession is obtained on the prize side, the claim should not be entertained on the admiralty side. The appellants moved to transfer the Government's claim to the prize side for final determination. The motion was based on the ground that the Government had not yet perfected or acquired a right to advance a claim to the vessel. It had not yet submitted the question of seizure to the district court on its prize side for determination whether it should enter an order of detention, condemnation, confiscation or requisition on payment of compensation.

If the Shipping Board, promptly after the seizure of the vessels, had brought these questions of international law to this Court on its prize side, the questions would have been finally decided, the proper procedure determined, and the embarrassing situation in which the United States has since found itself would not have arisen.

If this Court adopts the theory of confiscation argued by counsel for the Government in their brief in this case, it will undo utterly the statesmanlike results obtained by Secretary of State Elihu Root and Ambassador Joseph H. Choate in connection with the Second Hague Convention of 1907. It would also be at variance with the policy furthered by Secretaries of State John Hay and Charles Evans Hughes of the immunity of enemy private property from confiscation. It would also be in conflict with the usages of nations from which there has been no departure for more than a century (excepting the instances above mentioned in the European War).

The two principal authorities relied on by counsel for the Government in their brief are *Brown* v. *United States*, 8 Cranch 110 and *Miller* v. *United States*, 11 Wallace 268. Only certain *dicta* in *Brown* v. *United States* can be said to relate to this case. Those *dicta* were overruled by the same Chief Justice Marshall in *United States* v. *Perchemann*, 7 Peters 51, and again by this Court in *United States* v. *Klein*, 13 Wallace 128, *The Paquete Habana*, 175 U. S. 677, and other decisions in which it was held that usages of nations are law which will be enforced by this Court.

In Official History of the War, volume 2, Seaborne Trade, by C. Ernest Fayle (published 1923 by Longmans, Green & Co.; based on official documents; by direction

of the Historical Section of the Committee of Imperial Defence), at page 38, it is said:

> "To some extent the shortage in tonnage was made good during the early months of 1915 by bringing into active employment the prizes and detained vessels lying in British ports. The utilization of these vessels had been hampered by lengthy Prize Court proceedings, especially in the Oversea Courts; but by the end of January, 1915, all had been condemned or requisitioned, and those in oversea ports were being brought home by the Oversea Prize Disposal Committee, appointed in November, 1914, under the chairmanship of Vice-Admiral Sir Edmond Slade, in order that they might be utilized to the best advantage. Ships which, under the Sixth Hague Convention of 1907 were subject only to detention, could not be transferred to private owners, nor could they be generally employed in foreign trade, as there were difficulties with regard to their reception in neutral ports. The right of requisition, however, was unquestionable, and practically all the ships detained in home ports were ultimately employed, under the supervision of the Oversea Prize Disposal Committee, in coasting traffic, especially in the supply of coal to London. A few of the prizes condemned by the Courts were sold outright to British firms, by whom they were employed in their ordinary trade."

In Letters of Franklin K. Lane, at page 246, quoting a letter from Secretary Lane to Frank I. Cobb of the New York World written on April 12, 1917, before the adoption of the Congressional Resolution of May 12, 1917, it is said:

> "We of course are going to press into service at once the German and Austrian ships, such of them as can be repaired and will be of use in the freight business, but we will not confiscate them."

In Woodrow Wilson as I Know Him, by Joseph P. Tumulty, at page 529, the following cable dated May 25, 1919, from President Wilson at Paris to Mr. Tumulty at Washington, is quoted:

> "No one need have any concern about the return of the German ships in our possession. Full understanding has been reached about them."

In Woodrow Wilson and the World Settlement, by Ray Stannard Baker, volume 2, pages 392 and 393, discussing the conferences between President Wilson, Mr. Lloyd George, Mr. Clemenceau, and Mr. Orlando, after the Armistice and before the execution of the Treaty of Versailles, it is said:

> "But all discussions as to what ships the enemy powers should give up faded into insignificance alongside the controversy over who was to receive them. For it was plain that the nation which got the most ships quickly could soonest capture world trade. The greatest contest was over the ships which had been seized in American ports upon our declaration of War. These amounted to nearly ten per cent. of the existing ships; and the principle involved a great many more seized by Brazil and Portugal under similar circumstances.
>
> Two contrary doctrines at once developed. (The two cases are developed at length in the Supplementary Report of the Sub Commission on Capacity to Pay, of April 18. Also in appendix to Minutes, Council of Four, April 23.)
>
> The proposal of the European Allies was that Germany should simply cede to the Allied and Associated Powers title to all the ships in which she did not lose it by legal transfer or prize court decisions. The American proposal was that she should make cession to the individual powers in whose possession the ships were at the time, thus

leaving to the United States all the ships seized in our harbors. In short the Allies wished to pool these ships with all the others and redistribute them in proportion to losses during the War.

The essential objection to the American proposal was that powers which had been neutral in the beginning of the War and so had attracted German ships to their ports of refuge would receive more tonnage than they had lost; while the Allied Powers would receive much less than their losses. The discussion was hotly pursued by the experts, and even more violently in the Council of Four."

And at page 395, quoting the Secret Minutes of the Council of Four, June 10, 1919, Mr. Baker says:

"President Wilson pointed out that this shipping was the only *reparation* that the United States would receive after all their efforts in the War.

Mr. Lloyd George said that for the next few years tonnage was worth a great deal more than money. Those who were able first to establish themselves in overseas trade would gain enormous advantages * * *. It would be easier for him to justify to the British Parliament a claim by the United States for pensions than for these ships. He hoped that no arrangement would be concluded at the expense of France and Great Britain."

Counsel for the Government in their brief rest on the theory that the Government did not merely in April, 1917, detain or sequester the *Antigone* and later under authority of the Resolution of Congress of May 12, 1917, operate her as sequestered or seized enemy property, until she was ceded to the United States by the Peace Treaty.

Government's counsel contend that Congress and the

President intended to seize in 1917 not merely the right to operate the *Antigone* for the period of the war, but also all permanent property rights in the *Antigone*.

There was, of course, no public need for a seizure of more than the right to operate the *Antigone* during the war. It would seem so clear as to be obvious from the debates in Congress, the various bills and amendments introduced, and the contemporaneous statements of the officers of the Executive, that it was the intention of everyone not to seize the right to operate the *Antigone* after the war was over or to effect any permanent taking.

A seizure of the right to operate the *Antigone* after the war was over would not be a seizure for war purposes, but a seizure for possible use of the vessel after the war was over as part of a merchant marine. Congress had no such thought in mind.

Also a permanent taking without prize court condemnation would have been in clear violation of international law and the usages of nations. Congress, assuming it had the power, intended no such violation. Such intention should not be presumed in the absence of the clearest language. Such permanent taking could only be justified on the assumption that Congress intended to treat the unoffending, privately owned enemy ships as spoils of war. This would be contrary to the well-settled policy of the United States.

Counsel for the Government would make the words "immediate possession and title" in the Resolution read "permanent possession and title". An examination of the files of the other Departments of the Government would have made it clear to counsel for the Government that neither the President nor Congress in 1917 had any such intention. Congress was not waging war against unarmed privately owned enemy property which we had invited into our ports for commercial purposes in peace time. It was waging war against the German army and

navy and merely wished these privately owned enemy vessels to continue to operate between the United States and Europe so that our army and its supplies could get over there to fight the German army.

The Western Maid, 257 U. S. 419, is inapplicable. There was no seizure in that case. Ownership of the vessels by the United States was admitted.

The Siren, 7 Wall. 152, however, is directly in point. In that case as here the colliding vessel had been seized by the United States and while in custody or possession of the United States and before any condemnation by a prize court or acquirement of title by treaty was in collision and thereby became subject to a maritime lien. The United States there, as here, filed a claim to the vessel stating that she had been seized as prize or spoils in time of war. This court recognized the title of the United States, as we ask it to do here, subject to satisfying first the collision lien. It is not questioned by the United States that the *Antigone* at the time our libel was filed was within the territorial limits of the court and was at that time subject to the ordinary *in rem* process of the admiralty courts (the *in personam* remedy provided by the Suits in Admiralty Act being of course a mere substitute for an *in rem* remedy).

The Siren has never been overruled. In *The Western Maid* it was distinguished on the ground that in *The Siren* the United States voluntarily filed a claim in the court that the vessel had been seized by it in time of war and therefore belonged to it as a prize. This Court held that the filing of such a claim was itself a submission to the jurisdiction of the court. The United States has filed the same claim in the present case.

The China, 7 Wallace 153, case is, however, much stronger for the appellant than *The Siren.* In *The Siren*

commissioned officers of the United States Navy were in charge of the ship at the time of the collision. In the present case a civilian pilot was in charge and a non-commissioned employee was acting as master. Aside from *The Siren,* the present case is therefore sustainable solely on the authority of *The China,* 7 Wall. 53. In *The China* as here, a civilian pilot was in charge of the colliding vessel. This court held that the vessel was liable *in rem* irrespective of who owned her. No pilot being in charge of any of the vessels in *The Western Maid, The China* was not referred to by Mr. Justice Holmes in his opinion in that case. *The China* has not been overruled or modified, and has been followed innumerable times by the admiralty courts.

The seizure was in fact a "detention" or sequestration and operation like the British detention and operation of similarly seized ships and like our Alien Property Custodian seizure and operation of property on land. There was no intent to condemn the *Antigone* as property of United States.

Our case can be supported entirely independently of *The Siren* and *The China.* The *Antigone* in April, 1917, was detained or sequestered as enemy property in the same way that the Alien Property Custodian later, under the Act of October, 1917, sequestered the remaining enemy owned property.

The Resolution of Congress on May 12, 1917, merely confirmed this sequestration and authorized the operation or use of the sequestrated ships in the same way that the Alien Property Custodian was authoribed by the Act of October 6, 1917, to operate or use the property sequestered by him. The ships were designed for operation and in normal times

"ploughed the seas". The Resolution merely authorized the continuance of their normal operation as "going concerns". The *Antigone* in peace time normally sailed as a liner between Europe and the United States. After the adoption of the Resolution and at the time of the collision she continued so to sail.

Neither Congress nor the President intended to condemn these unoffending privately owned ships as spoils of war, as property belonging to the United States. The only need was that the ships be continued in operation as instruments of transportation during the war and that the United States have the right to designate what cargo or passengers should be carried on them. The intent was to seize only enough to satisfy this need. If the war had ended as a draw two days after the ships were put in operation in accordance with the Resolution, can there be the slightest doubt that the ships would have been returned to their private German owners?

Could the United States immediately after the seizure have made a gift of these seized ships to, say, a private citizen of a neutral country?

The only reason they were not actually returned was because we won the war and because President Wilson at the Peace Conference and Congress by the Treaty with Germany took the position for the first time that these ships were spoils of war and were the only reparations that the United States would receive. The Versailles and Berlin Treaties thus made these ships property of the United States. This we conceded in our pleadings and in our first brief.

But looking at the matter as of the time of the collision in this case, October 6, 1919, the German ships, particularly this ship, the *Antigone,* were still owned by the German owners and were merely being operated as sequestered property.

It would be an unprecedented and inequitable exten-

sion of the theory of immunity to hold that such sequestered property is so merged in the sovereignty of the United States as to be immune not merely from enforcement of liability but from the creation of liability for violation of the ordinary maritime collision rules.

The experience of centuries has shown that the universal observance of these rules is necessary to protect lives and property at sea. Exempting a fast steamer from the duty of observing these rules is like giving a man a gun and telling him to shoot anybody he happens to meet without fear of being held accountable. Moreover, to make innocent vessels bear the result of reckless navigation of these sequestered ships is to make innocent vessels bear the direct operating costs of waging the war.

At the time of the collision the *Antigone* still had her certificate of registry as a German merchant vessel. She was in structure an ordinary merchant ship. Her appearance had not changed since she was seized. She looked to approaching vessels like a private ship. Her crew were, according to the affidavit of Phipps, sworn in the Army Transport Service, but none of them was a commissioned officer of either the Army or Navy, nor an "officer of the United States" nor an enlisted man of the Army or Navy. She had no passengers or troops and no cargo on board, excepting a few boxes of household effects.

Yet counsel for the Government suggest that other passing vessels were not entitled to rely on the expectation that she would observe the ordinary collision rules under the penalty of being subjected to the usual maritime lien. According to counsel for the Government she could run amuck without either herself or any officer commissioned by the United States being held liable.

We contend that such a ship is not entitled to the extraordinary privilege of immunity from ordinary mari-

time liability or lien for a violation of the collision rules. Only the most exigent reasons should exempt property within the territorial limits of the sovereign from the ordinary jurisdiction of the sovereign's own judicial officers. If the facts disclosed show that naval or military maneuvers are not involved, but simply the ordinary application of the collision rules, why should not the sovereign's judicial officers maintain jurisdiction?

Judicial officers have jurisdiction over every act excepting political acts which by their nature are not justiciable.

If Congress had intended that this great fleet of sequestered ships should be immune from any obligation to obey the collision rules it would surely have said so. To grant such wholesale immunity would be imposing on innocent vessels damaged without right of recoupment, the direct, operating cost of the action that Congress was then authorizing, namely the use of the sequestered ships.

Immunity is accorded to battleships which are commissioned by the President and whose officers are also commissioned by him. Naval maneuvers and operations, cannot, of course, be governed by collision rules. But even in such case if damage is caused to innocent unarmed vessels a claim of ownership and of immunity is filed by a commissioned officer or other naval, military or political officer entitled to assert immunity for the ship and himself from the jurisdiction of the courts. *The Exchange,* 7 Cranch, 116.

This Court has been increasingly severe and rightly so, in requiring claims of immunity to be presented by a political or executive officer of the highest rank in the most formal way. *The Pesaro,* 255 U. S. 216; *In re Muir,* U. S. . A proper regard for the dignity of the judiciary requires that exemptions from judicial juris-

III.

Is a United States attorney entitled to advance a claim to a vessel in an admiralty court which is designed to oust the court of jurisdiction and which is based not on a document of title or on a decree of a prize court, but on a war time seizure cognizable only in a prize court administering international law? If so, is such claim an independent proceeding constituting submission to jurisdiction?

Is the extraordinary claim or suggestion filed by the United States attorney an independent proceeding in the sense that it requires the court to litigate not merely the subject matter of a collision cause in admiralty, but also the subject matter of the rights under municipal and international law acquired by a war time seizure of an enemy merchant vessel? If the claim raises this new subject matter, the Government under the decision of this court in *The Thekla*, 266 U. S. 328, has submitted to the jurisdiction of the court and our maritime lien should be recognized as a condition to any action by the court in determining on the evidence of the seizing official that property right in the *Antigone* should be confirmed in the United States.

The Government has never produced any commission, certificate of registry or enrollment, charter party or any other document of the *Antigone* showing right of possession or ownership in the United States. The so-called claim or suggestion of the Government is therefore unsupported by any evidence which is admissible in a collision cause in admiralty. Counsel for the Government have been unable to cite any admiralty collision case, and we have been unable after diligent search to find one, in

which mere evidence of a war seizure such as the Government relies on here has been admitted as evidence to show right of possession or ownership of the *res* under attachment. The present libel is for all purposes, a proceeding *in rem* against a *res* in possession of the admiralty court. The Government admits by the pleadings that at the time our libel was filed the *Antigone* was subject to the ordinary *in rem* process of the admiralty court at New York. The *in personam* remedy actually pursued under the Suits in Admiralty Act has been held by the court in *Blamberg Bros.* v. *United States,* 260 U. S. 452, to be a mere substitute for the *in rem* remedy.

The Government therefore is here trying in substance to take an ordinary merchant vessel from the possession of an admiralty court. The claim of privilege or right to do so consists of an unverified paper which is signed and filed only by the United States attorney at New York through two of his assistants, and which is unsupported by any ship's document or by the testimony of the master or any member of the crew, or by any evidence which has ever before been admitted in an admiralty collision cause.

Under these circumstances, as Circuit Judge Hough has held in this case the real question involved is whether the Government has a right to advance this peculiar claim in an admiralty collision cause.

The inadequacy of the Government's brief and proofs invites the Court either to dismiss the claim of immunity for insufficiency of evidence or explanation, or to hold that the Government's claim is itself a submission to jurisdiction, being a request for judicial determination of a property right.

As Judge Hough said (R. 23) the question involved is whether the Government has introduced sufficient evi-

dence to show that it is entitled to advance a claim of immunity to the steamship *Antigone*. He said:

> "The best analogy to such a thing as this 'suggestion' on the instant side is the trial of a claim. That is to say, it is old practice that a person proffering a claim to a vessel *in rem* may be called upon *in limine* to thresh out his right to claim. So here the United States must first thresh out its right to be dismissed without trial" (Judge Hough's Opinion, R. 23).

In *The Gul Djemal*, 44 Sup. Ct. 244, a claim of immunity on behalf of a vessel admittedly owned by the Turkish Government was filed by a duly commissioned officer of the Turkish Navy who was acting as master of the vessel. This Court held that:

> "The immunity could not have been successfully set up by a duly recognized consul, representative of his sovereign in commercial matters, in the ordinary course of his official duties, and there seems no adequate reason to presume that the master of the *Gul Djemal* had any greater authority in respect thereto. Although an officer of the Turkish Navy, he was performing no naval or military duty and was serving upon a vessel not functioning in naval or military capacity but engaged in commerce under charter to a private individual who undertook to carry passengers and goods for hire. He was not shown to have any authority to represent his sovereign other than can be inferred from his position as master and the circumstance specified in the stipulation of facts."

IV.

A grant of immunity in the present case would extend the limits of immunity beyond those defined in *The Western Maid*, 257 U. S. 419. Moreover, the decision in *The Western Maid* has been criticised as based on a philosophical theory which is inapplicable to maritime law.

In the Government's Petition for a Writ of Prohibition in *The Carolinian* (heard and decided with *The Western Maid*, 257 U. S. 419), it was said:

> "At the time of the collision (February 15, 1918), the United States *commissioned* her (*The Carolinian*) as an Army cargo transport and employed her to serve military needs in war service" (p. 6).
>
> "At the time of the collision the *Carolinian* was a *commissioned* Army transport" (p. 6).

The libel "presents a claim for tort arising out of a collision alleged to have resulted from the incompetence or want of skill of Army officers *commissioned* to man and operate an Army transport" (p. 8):

> "The *Carolinian* at the time of the collision was a vessel belonging to the United States" (p. 7).

The Government, in its suggestion in *The Carolinian*, 257 U. S. 419, said (Record, *Carolinian* case, p. 14):

> "At the time of the collision, February 15, 1918, the steamship *Carolinian* had been requisitioned by the Government of the United States upon the bare boat basis, copy of which bare boat charter is filed herewith."

The bare boat charter party under which the *Carolinian* was operating at the time of the collision provided (Record, *Carolinian* case, pp. 32 and 34):

> "War and Marine Risks.
>
> "Fourth: The United States shall assume war, marine, and all other risks of whatsoever nature or kind, including all risk of liability for damage occasioned to other vessels, persons or property" (Record, *Carolinian* case, p. 32).
>
> "Compensation in Event of Loss or Damage.
>
> "Ninth: In case of actual or constructive loss as provided in clause tenth, due to the operation of a risk assumed by the United States, just compensation for such loss, with interest at 6 per cent. per annum, commencing 30 days after the date of such loss, shall be paid by the United States" (Record, *Carolinian* case, p. 34).
>
> "In case of damages (not constituting an actual or constructive loss) due to the operation of a risk assumed by the United States, the vessel shall, at the cost to the United States, be restored to the owner at the expiration of her service under the requisition, in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear excepted; or just compensation for the damages, with interest at 5 per cent. per annum, commencing 30 days after proof of such damage upon redelivery of the vessel, shall be paid by the United States."

In the present case the United States made no promise to return the seized enemy property free from physical injuries or collision liens.

Moreover, the contention of the Government in this case is based on a misconception of what a maritime lien is (see *The China*, 7 Wall. 53 and *The John G. Stevens*,

170 U. S. 113, 120), and shows a confusion of thought with reference to the relation of rights *in rem* and in *personam* to actions and procedure *in rem* and *in personam*. See Professor Walter Wheeler Cook's article in 15 Columbia Law Review 37-54.

The majority opinion of this Court in *The Western Maid* apparently assumed that the lien involved was a lien dependent on possession or right of immediate possession, like a common law lien. The Court decided that because the lien could not be enforced by dispossessing the sovereign in possession, there was no lien. But it has been settled by a long line of decisions both in England and this country that a maritime lien for collision damages is not dependent on possession. The leading case is *The Bold Buccleugh*, 22 English L. & Eq. 62. The English and American decisions are reviewed in *The Marjorie*, 151 Fed. 183 (C. C. A.).

In *United States* v. *Lee*, 106 U. S. 196, an action to recover possession of property, the Attorney General of the United States, without making the United States a party to the suit, filed a motion to dismiss on the ground that the property belonged to the Government and was in actual possession of its officers, and that, therefore, the Court was without jurisdiction to entertain the suit. This Court in a notable opinion rendered by Mr. Justice Miller considered with great fullness the doctrine of the immunity of the Government from suits without its consent, and hold that this immunity did not apply when suit was brought against Government officials in unlawful possession of property. The Court, thereupon, ousted the Government from possession.

In the dissenting opinion the same point was made that is made here by counsel for the Government, that

the suit was simply an action "to invade the possession of the sovereign and to disregard the fundamental maxim that the sovereign cannot be sued".

Referring to the decision in *United States* v. *Lee*, *Charles Warren in Supreme Court in U. S. History*, vol. 2, page 395, says:

> "Though the decision is now regarded as one of the glories of American law, there were varied views taken of it at the time of its rendition * * *.
>
> The highest tribunal of the Union by its decision, in short, has recognized the wisdom and solidity of a response made by Judge Shipman to one member of the Court, during the proceedings—a response which will, let us hope, become proverbial in American thought and speech. 'Do I understand your position to be', said one of the Supreme Court Judges to Judge Shipman, 'that if the title to a piece of land on which the Government has set up a lighthouse should be disputed, the claimant might bring an action of ejectment, and, if successful, remove the lighthouse?' 'Certainly', replied the intrepid lawyer. 'That is my position. Far better extinguish all the lighthouses in the land than put out the light of the Law.'"

Professor John Dewey in *23 Columbia Law Review* 406, reviewing H. Krabbe's Modern Idea of a State, said:

> "Both from the side of law and of politics there has been of late years a growing revulsion against the theory of the state as sovereign which ruled jurisprudence as well as political theory from the seventeenth century. * * * The state in giving and administering law is still bound by law; it is not sovereign in the old sense.
> * * * * * * * *
>
> He (Dr. Krabbe) then shows how the political theory of the sovereign as the source of law led to

a conceptual system of jurisprudence, what Professor Pound has called mechanical jurisprudence. * * * * * * * *

The book is a notable contribution to the movement to define the state as a legal organization of community interests instead of as an extra-legal political force, and to interpret concrete problems of law from this point of view."

Professor Munroe Smith of Columbia University, in "Jurisprudence", at pages 31 and 32, said:

"The conception of the legal right is today so familiar, and it seems so simple, that we can hardly realize with what difficulty it was attained. But as early law was wholly remedial and the substantive legal order which the remedies supported was only slowly recognized so the legal right long lay concealed behind the correlative and essentially ethical notion of the duty. * * * And only in our own time has it been clearly perceived that the legal right, previously regarded as the atom of all legal relations, is itself a combination of a definite interest and a limited power, and that these two elements are separable. This was one of Jhering's great contributions to jurisprudence. Coupling this analysis with Burgess's sharp distinction between state and government, we see that it is in no sense inexact, as has been frequently asserted, to speak of public legal rights. Of course, limited powers can not be attributed to the state, because the state is legally omnipotent; but limited powers may properly be attributed to any organ of government, and our public rights are in fact a combination of definite public interests with limited governmental powers. The possible developments of this line of thought in private and in public law are as yet imperfectly realized."

The dictum in *The Western Maid*, that the usages of nations constituting maritime law are a part of the

municipal law of the United States and, therefore, are enforceable only as expressions of the local sovereign's will is, of course, true, provided the usages are applied by the courts as they actually exist and are not cut down, as in *The Western Maid,* by immunities based on a monist theory of municipal law.

In *19 Columbia Law Review,* 429, at page 466, Definition and Nature of International Law, it is said:

> "It is said, however, that international law is a part of municipal law, and a considerable discussion in the books will be found on this subject as to which there is great obscurity of thought. It is perfectly obvious upon reflection that the two bodies of law are so entirely separate and distinct with respect to one of the prnicipal factors determining the conduct in question that in no sense can it be said that international law is a part of municipal law, or *vice versa.* What this confusing discussion amounts to is this: the international factors operating on a state determine the conduct of that state, and the state whose conduct is so determined must in turn see that its individual members and subordinate officials comply in their conduct with that international obligation resting upon it. The state, therefore, must make its municipal law conform to the international obligation unless it desires to act contrary thereto."

Professor Munroe Smith of Columbia University in *Jurisprudence* (Columbia University Press), said:

> "The reaction in favor of constituted authority produced both the positivist and the historical theories of law, or at least led to their more precise formulation. The positivist theory, as formulated by Hobbes, was a direct result of the English revolt against the crown. Hobbes did not deny the existence of natural law, but he asserted that

it was not 'law proper'. The law of nature, he neatly remarked, 'is become of all laws the most obscure, and has consequently the greatest need of able interpretation'. Only the sovereign or the judges to whom he delegates authority are competent interpreters. This of course is the theory which was implicit in the Roman jurisprudence, but Hobbes was the first to make it explicit.

The historical theory wos formulated in the reaction against the French revolution. The historical school found its antidote to the natural-law theory, not in the will of the sovereign, but in the authority of the past. According to this theory, presented in the field of public law by Burke, formulated as applicable to all law by Savigny, law is not made, it grows. The judge who declares it, the legislator who seems to make it, are simply interpreters of the national sense of right; and this in its turn is a product of the nation's entire historical existence.

To a certain extent the historical school also represents, at least in English-speaking countries, a reaction against the positivist school; less indeed against the theories set forth by Hobbes than against those formulated by the so-called 'analytical' jurists. Confusing, as did Hobbes himself, the state with the government and finding sovereignty not in the crown, as did Hobbes, but in Parliament, the analytical jurists have always been inclined to regard legislation as the normal source of 'law proper'. Maine and other English adherents of the historical school have not only rehabilitated judge-made law, but they have restored custom to its ancient (and perhaps unduly exalted) dignity and importance" (p. 36).

"The belief, so generally held to-day, that in a really advanced civilization legislation must cover the whole field of the law, that the finding of law by courts is a remnant of archaic conditions destined gradually to disappear—this belief has no basis except in the conditions existing to-day in continental Europe and in those countries which

have derived their institutions from continental Europe" (p. 26).

The usages of nations constituting the maritime law and international law are facts. They can be proved by evidence. It would seem to be unfair to suggest that such actual usages are imaginary by characterizing them as a "brooding omnipresence in the sky" (*The Western Maid*, 257 U. S. 419) simply because the legislative body of one nation has not enacted them as a statute. It would appear to be the important and peculiar province of the judiciary to act as the organ of the sovereign in taking judicial notice or receiving evidence of these international usages and then applying them. How do international usages become part of our law? Simply by their application by this Court in a given case on its being satisfied that the usages exist. *The Paquete Habana*, 175 U. S. 677. It is rather belittling the function of the judiciary under our Constitution to suggest that the only law—maritime of international—that this Court can apply is the statutory law enacted by Congress. The Constitution conferred on the judiciary the power and duty of applying the usages of the maritime law, and a great many years elapsed before Congress attempted to modify in any respect the content of those usages. It cannot rightfully be said that the usages of nations constituting maritime and international law are not law at all because there is no sanction or power of enforcement. It is the province and duty of our Federal courts to enforce such usages when they are shown to exist in a given case. From time immemorial the admiralty courts of the various civilized nations have been enforcing, without the guidance of legislative enactment, the maritime usages of nations. This Court has time and again enforced international law. There is therefore, behind these usages, the sanction and power of the local sovereign through his judicial arm.

Moreover the conception that law is based on the "power" of a State or sovereign is inconsistent with the fundamental theory of our form of government. It is true only of law imposed by a State or sovereign such as Germany was before the War. It is the conception of Treitschke in his "Politics" (translated by Dugdale and DeBille, vol. I, p. 22) that the State is, "above all, Power which makes its will to prevail". It cannot "tolerate any power above its own" (I, 26). Treitschke then concludes from the conception of the State as absolute will that the State is obliged to keep its treaties only so long as it wills to do so (vol. I, p. 28; vol. II, pp. 596-597).

If we fought "to make the world safe for democracy", it would be ironical if this Court should, after the victory, adopt the "Power" philosophy on which the defeated militaristic State was nourished.

In *The Scotia,* 14 Wallace 170, 187, Mr. Justice Strong, delivering the opinion of this Court, said:

> "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. * * * When therefore we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty

> of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision * * * took place."

The question involved may be stated as follows: Did the United States, by entrusting the *Antigone* to the custody of her master and making him its agent, confer on him the "power" to subject the vessel to "liability" by altering her relations with other vessels. Professor Walter Wheeler Cook's article on Hohfeld's Contributions to the Science of Law, 28 Yale Law Journal 721, at page 727.

The United States entrusted the master of the *Antigone* with the power of navigating her on waters where other vessels, in order to insure the safety of the *Antigone* as well as their own safety, were observing the maritime collision rules. In other words, the United States conferred on the master of the *Antigone* the physical power of altering her physical relations with other vessels by colliding with them, resulting injuries to herself as well as the other vessels. His "power" to alter her legal relations is a mere corollary and incident of this grant by the United States.

This is of course but another way of saying that the United States by sending the *Antigone* to navigate among other vessels who are observing collision rules is voluntarily submitting her to the application of those rules and their enforcement by the courts.

In Law and Morals by Roscoe Pound, Dean of Harvard Law School, it is said:

> "In a crowded community where mechanical agencies of danger to the general security are in

> everyday use, and many sorts of business activity incidentally involve potential injury to society, thoughtlessness and want of care, or stupidity, or even neglect to supervise one's agent at his peril, may be as anti-social as a guilty mind, and so a group of legal offences may develop that take no account of intent" (p. 69).

Wrongdoing or a common law tort is not a necessary element, as this Court apparently assumed in *The Western Maid,* 257 U. S. 419. The liability is one without fault. It results from an operating risk inherent in the movement of a dangerous vehicle among other vehicles.

In Justice and The Modern Law by Everett V. Abbott, page 44, it is said:

> "There is another large class of rights which really rest upon consent, but which are treated in the common law under the head of torts. I refer this time to the numerous kinds of action which are based on an allegation of negligence.
>
> The obligation of a common carrier is to transport its passengers in safety. It is an obligation created by free volition, and when by reason of an accident a passenger is so transported as to suffer injury on the way, then the common carrier has committed a breach of its contract. Again, when the owner of an office building constructs an elevator and invites the public to use it in going to his tenants' offices, he also assumes a voluntary obligation to keep his elevator in proper order for the transport of passengers, and a breach of that obligation gives rise to an action of contract. * * *
>
> It is probably true, however, that all the actions which are treated in the books and by the courts under the head of negligence are either actions for assault and battery or actions for breach of contract, and that with an accurate and

> understanding conception of the law the word negligence would disappear from our juristic vocabulary. It is at best only a question-begging epithet, because it tacitly assumes the existence of an obligation which we are too intellectually lazy to determine. * * *
>
> If the nature of these actions had been clearly understood, for example, we should probably have escaped the notorious 'fellow servant' rule, the absurd theories as to 'assumption of risk', and the anomalous doctrine that the plaintiff must allege and prove the absence of what we call 'contributory negligence'."

It would seem to be obvious that mere use for public purposes of privately-owned property does not exempt the property from the ordinary jurisdiction of the courts. Still more obviously so, if the property, as in the present case, is not owned by the public, the United States, and a decree against it will be paid not by the United States but by the sale of property of an enemy private owner.

In the late War, as a result of the elimination of all excepting "key" industries, the greater part of the property in the United States was being used for a public purpose in furthering the war. A decision exempting property from judicial process solely because of furthering a public purpose would be virtually a declaration that courts in time of war are practically useless. War modifies the law applicable in certain situations, but the calming influence of the judicial power in applying the principles of public order is never so sorely needed as during a war upheaval.

War may, however, suspend the remedy accorded by a court of sequestering property to enforce a judgment which it has entered or intends to enter. But the suspension of this privilege of judicial attachment is not inconsistent with the existence and applicability of the substantive law. A court will hear the cause and apply

the rules of the substantive law, letting the successful party wait until the end of the war or public use before obtaining an enforcement of the judgment by judicial seizure and sale of the property.

The enforcement of a common law possessory lien may be an exception to this rule. A maritime lien, however, is not an exception because it is not dependent on possession—(notwithstanding the apparent contrary assumption by the writer of the majority opinion of this Court in *The Western Maid,* 257 U. S. 419). It is, as this Court has often held, a property right, a *jus in re,* a right *pro tanto* of title or ownership. In *The Western Maid* this Court held, apparently inadvertently, that ownership or title cannot exist without right of immediate possession.

In 23 Columbia Law Review 327, it is said:

> "Title in turn is the generalization by which we have sought to denote those rights *in rem* which may be acquired or enforced or transferred independently of possession, a concept which we have gradually built up through some centuries of legal experience."

In *Political Thought from Spencer to Today,* by Professor Ernest Barker of Oxford University, it is said:

> "He (Mill) had no clear philosophy of rights * * *. He had no clear idea of that social whole in whose realization the false antithesis of 'state' and 'individual' disappears" (p. 10).
>
> "Eichhorn set the fashion of the historical treatment of law; Savigny carried his teaching forward. 'Law', he told the world, 'is the organ of folk-right; it moves and grows like every other expression of the life of the people; it is formed by custom and popular feeling, through the opera-

tion of silent forces, and not by the arbitrary will of a legislator * * * Maine * * * wrote in a similar sense in Ancient Law'" (p. 164).

"Quoting Dicey he says that 'Maine * * * in his Ancient Law undermined the authority of analytical jurisprudence'" (p. 167).

"Law itself can exist, and does exist, before there is any legal act of legislation" (p. 177).

"There is much talk of federalism in these days. Behind the talk lies a feeling that the single unitary State, with its single sovereignty, is a dubious conception, which is hardly true to the facts of life" (p. 181).

"There is, as we have seen in an earlier chapter, a sense of right common to civilized nations. It is in the explication of that sense, and in its translation into a concrete legal embodiment, that the hope of internationalism lies * * *. Of such a development, resting on such a basis, Lord Haldane spoke in 1913 in an address to the American Bar Association. And it is on such a development, taking a legal form, and resting ultimately, as he urged, on the *Sittlichkeit*, or sense of a common ethic, of a group of allied nations, rather than on a development issuing from any economic factor, that we must fix our hopes" (pp. 246-247).

In *Present Conflict of Ideals*, by Professor Ralph Barton Perry of Harvard University, at page 520, it is said:

"Popular government means, then, that sovereignty is distributed among those whose interests are at stake. It means that those who hold political office are not, strictly speaking, rulers; but agencies by which the people at large govern themselves. In such a polity there are no longer any subjects, but only citizens, that is, individual units of political power."

The usages of nations come into existence as events and are then enforced by our sovereign through his judicial branch. They are not, like municipal law, created by the local sovereign—as the writer of the majority opinion in *The Western Maid* suggested. As said by Professor John Dewey, in *Human Nature and Conduct*, page 3:

> "Any theory which attributes the origin of rule to deliberate design is false. To take advantage of conditions after they have come into existence is one thing; to create them for the sake of an advantage to accrue is quite another thing."

The implication in the majority opinion in *The Western Maid* that law is not concerned with ethics would seem to require qualification in relation to maritime and international law.

As said by Professor John Dewey in *Human Nature and Conduct*:

> "For practical purposes morals mean customs, folkways, established collective habits" (p. 75).
>
> "Habit means special sensitiveness or accessibility to certain classes of stimuli, standing predilections and aversions, rather than bare recurrence of specific acts. It means will" (p. 42).
>
> "Curiously enough, the chief practical effect of refusing to recognize the connection of custom with moral standards is to deify some special custom and treat it as eternal, immutable, outside of criticism and revision" (p. 81).

The maritime and international customs, habits and will are enforced as such by the Courts. This shows that the Austinian concept of the omnipotence of a local sovereign on which the analytical school bases its theories is irreconcilable with the actual practice of the Courts in enforcing maritime and international usages.

The usages are not deformed by the Courts to fit within the principles or analytical theories of municipal law.

In *Justice and The Modern Law*, by Everett V. Abbott, at page 3, it is said:

> "It is perhaps worth while to pause long enough to analyze the error into which they have fallen who believe that law can be separated from ethics. Austin defines the law as the command of a political superior, that is, the sovereign, to a political inferior, that is, the subject; and his definition embodies that usual conception which forbids us to seek any reason for the law behind the law itself. This theory, however, resembles the somewhat similar theory of an original state of nature propounded by the French Encyclopaedists in that, however attractive it may be as theory, it is not justified as history, because, except in a comparatively small number of instances, the requirements of the law are ascertained and declared long before any command issues from the sovereign * * *.
>
> What is true in English jurisprudence is true in every other jurisprudence. Until the civilization of the community has advanced to a point at which a legislative power, be it king, or parliament, or the people at large, reduces the unwritten law to writing and promulgates it as a rule of conduct to be obeyed by the people generally, the adjudication of rights is fully accomplished without any command from the sovereign whatsoever. The power of the sovereign is, indeed, invoked to make the adjudication effective, and then commands are issued to the parties to the litigation; but the command which is embodied in an adjudication affects only the rights of the particular parties to the suit and their successors in interest, and is not the kind of command which declares the law for a community."

In *Law and Morals,* by Roscoe Pound, Dean of Harvard Law School, it is said:

> "When the analytical jurist analyzes the precepts and doctrines and institutions of developed law and, in the apt language of Mr. Justice Holmes, washes the results 'in cynical acid' (*Collected Papers,* 174), and thus finds fundamental legal conceptions of right and duty and power and liberty or privilege devoid of any moral content, he much deceives himself" (p. 34).
>
> "Except for routine cases, the analytical jurist grossly underestimated the role of morals in everyday decision. Morals do more than serve as a last resort when all else fails" (p. 39).
>
> "Analytical jurisprudence assumed that 'law' was an aggregate of rules of law" (p. 45).
>
> "Assuming an exact logically defined separation of powers, the analytical jurist contended that law and morals were distinct and unrelated and that he was concerned only with law" (p. 46).
>
> "Thus two false assumptions are at the basis of the analytical doctrine" (p. 48).

In *The Western Maid* this Court held that because the sovereign could not commit a "tort" (a word which, as Judge Hough has said, is "unknown to the historic admiralty") a maritime lien could not arise. The word *"tort"* is an invention of text writers.

In *Law and Morals,* by Roscoe Pound, Dean of Harvard Law School, it is said, at page 121:

> "In American procedure we shall find the courts setting up a system of actions *ex contractu* and actions *ex delicto,* actions known neither to the common law nor to the codes of procedure, on the basis of a 'natural' system of common-law actions worked out by text writers for convenience of exposition. (See *Bliss, Code Pleading,* sec. 9; *Supervisors* v. *Decker,* 30 Wis. 624; *Scott, Progress*

of the Law—Civil Procedure, 33 Harvard Law Review 236, 240-242.) We shall find philosophical pictures of an ideal social order, as in American applications of the doctrine that the common law is in force only so far as 'applicable' * * * We shall find scientific political ideas used in the same way in many legal precepts involving the idea of 'sovereignty'."

In *The State and The Nation,* by Edward Jenks, at pages 272 to 275, it is said:

"Finally, there is a profound and far-reaching distinction between Common Law and Prerogative States, though it is not very easy for any one but a lawyer to grasp. Perhaps it may be best explained by saying that, in the former class of States, the Government or other public official stands on precisely the same ground, as regards legal responsibility for his acts, as the private citizen; while, in the latter, the Government official is in a privileged position, is at least always presumed to be right, and his alleged offences are tried, not by the ordinary public tribunals, but by special Courts, composed, ultimately, of members of his own class, sometimes sitting in secret session. * * *

By a well-understood rule of English law, the 'King can do no wrong'—that is, no proceedings alleging a wrongful act can be directed against the King personally. But this rare immunity, granted for obvious reasons, does not extend to protect those who act by the King's orders; that point was finally settled on the impeachment of the Earl of Danby, more than two hundred years ago. And, though the King can pardon a convicted criminal, he cannot pardon an accused person before conviction; and he cannot intervene to stay a private lawsuit. This great Rule of Law extends even to the acts of the military authorities, both in war and peace; and the only occasions on which its application in this respect

has been seriously questioned in recent years, have arisen out of the employment of soldiers to quell disturbances of the peace. * * *

It must be remembered, that a British soldier is in the difficult position of being under two different and occasionally conflicting laws * * * the civil law which says that any one guilty of deliberately causing the death of a fellow-creature without lawful warrant is liable to be hanged, and the military law, which says that a soldier refusing to obey orders of his military superior is liable to be shot. Happily the British military code of obedience, strict as it properly is, is not absolute; and it may be safely said that there is no rule in it which condemns to death the man who refuses an *unlawful* military order.

All this may seem, to a Briton or an American, ordinary enough, nurtured as he has been in traditions of freedom. But it might be well that he should realize how rare it is, even among civilized nations. In many Oriental countries, the private civilian is helpless before authority, even in its most subordinate form; and it may be that government in such countries is not possible on 'common law' terms. But, even in European States, it is regarded as an impossible ideal; and Continental writers profess gravely to doubt whether government can really be carried on where it prevails. When confronted by the fact that 'common law' government in the British Empire and the United States has not been devoid of stability, these writers are apt to shrug their shoulders, and set down the fact as one of the many oddities of the Anglo-Saxon character. By any one who preserves an open mind, it can hardly be dismissed so lightly. Though, or perhaps we should say because, it is the outcome of a long historical struggle, in which the spirit of freedom has successfully fought against tyranny on the one hand and anarchy on the other, it is a contribution to practical politics of which the Anglo-Saxon has every right to be proud, perhaps more proud

than of any other of his political achievements. It implies no disrespect for authority, even authority as embodied in the State."

Professor Orrin K. McMurray in 23 Columbia Law Review 405, reviewing Oxford Studies in Social and Legal History, edited by Sir Paul Vinogradoff, said:

> "His (Dr. Ehrlich's) study of the liability of the crown during the period covered by him should at least serve to demolish the belief, finding support in utterances of some of our greatest lawyers, that the non-liability of the sovereign is a necessary corollary of the doctrine of sovereignty. As Dr. Ehrlich says, speaking of the thirteenth and fourteenth centuries (p. 54), 'Legal thought did not distinguish *in abstracto* between the king and other persons'. Mediaeval law started out with the idea that 'every wrong ought to be redressed' (p. 52), and found no difficulty, as the evidence conclusively proves, with such a doctrine as that the king may commit a tort and be a disseisor. The maxims 'that the king can do no wrong', '*nullum tempus occurrit regi*', and the like, did not, in Bracton's day, have the extent or definiteness of meaning that later was given them. The story of the development of the particular doctrine of the immunity of the sovereign from suit is wrapped up with the history of the prerogative. That American lawyers should have swallowed this creation of the prerogative lawyers, fish, bait and hook, is indeed surprising in view of the fate of the prerogative generally in our country."

CONCLUSION.

The decree below should be reversed with costs.

The claim or suggestion of the United States should be dismissed either for insufficiency of proof or because

not presented by a proper officer. If not dismissed the claim should be held to be an independent proceeding constituting a submission to the jurisdiction on either the admiralty or prize side of the court.

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